IN THE SUPREME COURT OF THE STATE OF DELAWARE

AUGUSTUS H. EVANS,	§	
	§	No. 471, 2007
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware, in and
v.	§	for Sussex County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0609011528A
Appellee.	§	

Submitted: November 13, 2008
Decided: February 13, 2009

Before **HOLLAND, JACOBS** and **RIDGELY,** Justices.

O R D E R

This 13th day of February 2009, upon consideration of the briefs on appeal and the Superior Court record, it appears to the Court that:

(1) Following a three-day jury trial in the Superior Court, the appellant Augustus H. Evans, was convicted of Assault in the Second Degree, Aggravated Menacing, Resisting Arrest with Force or Violence and two counts of Possession of a Firearm During the Commission of a Felony (PFDCF). Evans was sentenced as a habitual offender to twelve years at Level V for the assault conviction and to a

total of sixty years at Level V for PFDCF.[1] Evans represented himself at trial and continues to represent himself in this direct appeal.

(2) The evidence presented at trial fairly established that within a ten to twelve hour period, *i.e.*, from Saturday evening, September 16, 2006 through Sunday morning, September 17, 2006, Evans was involved in two gun incidents. The first incident occurred Saturday night in Seaford, Delaware, when Evans fired three shots at a rival drug dealer, William Witherspoon, hitting Witherspoon once in the left thigh. The second incident occurred Sunday morning in Laurel, Delaware, when Evans pointed a gun at Officer Charles Campbell of the Laurel Police Department.[2]

(3) Evans was arrested on September 17, 2006, for the Laurel incident. Two days later, while in custody pursuant to the Laurel arrest, Evans was interviewed by Seaford Police Lieutenant Richard Jamison about the Seaford incident. During that videotaped interview, which was played for the jury at trial, Evans essentially admitted to shooting Witherspoon.

(4) Lieutenant Jamison showed Witherspoon a mug shot book and asked him to pick out a photograph that he thought was a match for the person who shot him. Witherspoon chose a photograph. The photograph was not Evans.

---

[1] Evans received suspended sentences for aggravated menacing and resisting arrest.
[2] Campbell was investigating a terroristic threatening complaint at the time.

(5) Jamison had doubts about Witherpoon's identification and continued his investigation.[3] Jamison showed Witherspoon two photo arrays, the second of which included Evans' photograph. Witherspoon identified Evans' photograph from the second array.

(6) Evans did not testify at trial. He did, however, offer an alibi defense through three family members.[4]

(7) Evans raises five issues for this Court's consideration. First, Evans challenges the validity of his indictment. Second, Evans argues that there was insufficient evidence to convict him of the Laurel charges. Third, Evans claims that he did not knowingly and voluntarily waive his *Miranda* rights. Fourth, Evans argues that the photographic lineup was unduly suggestive. Fifth, Evans alleges ineffective assistance of his standby counsel.

(8) With the exception of his ineffective assistance of counsel claim, Evans raised all of his claims without success in the Superior Court. Evans' claim that his standby counsel provided ineffective assistance was not presented to the Superior Court in the first instance. It is well-established that this Court will not

[3] The record reflects that Witherspoon had chosen a photograph that was ten-years old.
[4] Evans' family members testified that he was at a party with them Saturday evening, September 16, 2006 until at least 1:00 a.m. on Sunday, September 17, 2006.

consider a claim of ineffective assistance of counsel that is raised for the first time on direct appeal.[5]

(9) Evans argues that the Seaford and Laurel charges were improperly joined in the same indictment, and that the indictment was defectively vague and/or inaccurate with respect to the date and location of the charged offenses. Also, Evans argues that the Seaford charges are invalid because he was not formally arrested and was denied a preliminary hearing on those counts.

(10) Evans' claim of improper joinder is not supported by the record. "The purpose of joinder is to promote judicial economy."[6] The Seaford and Laurel offenses, although committed against different individuals, involved a similar course of conduct and were alleged to have occurred within a relatively short period of time.[7] We agree with the Superior Court that the Seaford and Laurel offenses were properly tried together.

(11) "The purpose of an indictment is to place the defendant on notice of the crimes with which he has been charged and to preclude a subsequent prosecution for the same offense."[8] Evans has provided no support for his claim

---

[5] *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).
[6] *McLaughlin v. State*, 2001 WL 1388639 (Del. Supr.) (citing *Sexton v. State*, Del. Supr., 397 A.2d 540, 545 (Del. 1979), *overruled on other grounds*, *Hughes v. State*, 437 A.2d 559 (Del. 1981)).
[7] *See* Del. Super. Ct. Crim. R. 8(a) (providing in relevant part that two or more offenses may be charged in the same indictment if the offenses charged "are of the same or similar character").
[8] *Dawkins v. State*, 2005 WL 2254197 (Del. Supr.) (citing *Malloy v. State*, 462 A.2d 1088, 1092 (Del. 1983)).

that the indictment in this case failed to place him on notice of the crimes with which he was charged.

(12) Evans may be correct that he was not formally arrested and taken before a magistrate for the Seaford charges. The record reflects, however, that Evans already was in custody when he confessed to the Seaford shooting.

(13) The purpose of an arrest warrant is to establish to a neutral magistrate that there is probable cause to arrest the individual.[9] In this case, Evans' indictment was an independent finding of probable cause.[10] As a result, any deficiency in his arrest on the Seaford charges was cured by the indictment.[11] Similarly, wherein Evans properly was charged by grand jury indictment, he was not entitled to a preliminary hearing on the Seaford charges.[12]

(14) Evans claims that there was insufficient evidence to convict him of two of the three Laurel offenses, *i.e.*, Aggravated Menacing and one count of PFDCF.[13] In support of his claim, Evans argues that the police never recovered the gun, and an eyewitness to the incident "recanted her testimony three days before trial."

---

[9] Del. Super. Ct. Crim. R. 4.
[10] *Brokenbrough v. State*, 1994 WL 605435 (Del. Supr.) (citing *Joy v. Superior Court*, 298 A.2d 315, 316 (Del. 1972)).
[11] *Id*.
[12] *Caldwell v. State*, 2007 WL 188168 (Del. Supr.) (citing *Holder v. State*, 692 A.2d 882, 885 (Del. 1997)).
[13] In his opening and reply briefs, Evans concedes that there was sufficient evidence to convict him of resisting arrest.

(15) In reviewing a claim of insufficiency of the evidence, the inquiry of this Court is whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the charged offense beyond a reasonable doubt.[14] In this case, the State had to prove that Evans possessed a firearm[15] and displayed what appeared to be a deadly weapon while intentionally putting Officer Campbell in fear of imminent physical injury.[16] When viewed in the light most favorable to the State, Officer Campbell's testimony is ample evidence that Evans committed aggravated menacing and possessed a firearm while doing so.

(16) Evans claims that he did not knowingly and voluntarily waive his *Miranda* rights prior to his custodial interrogation by Lieutenant Jamison. Evans also claims that, because he did not testify at trial, the videotape of that interrogation was not properly introduced into evidence.

(17) As a general matter, any statement made by a suspect during a custodial interrogation will be admissible in the prosecution's case in chief if the prosecution demonstrates that the suspect has been advised of his *Miranda* rights and that the suspect waived those rights knowingly, intelligently and voluntarily.[17] In this case, it is clear from the videotape of Evans' interview with Lieutenant

[14] *Morrisey v. State*, 620 A.2d 207, 213 (Del. 1993).
[15] *See* Del. Code Ann. tit. 11, § 1477A(a) (2007) (defining PFDCF).
[16] *See* Del. Code Ann. tit. 11, § 602(b) (defining aggravated menacing).
[17] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Jamison that Evans was advised of his *Miranda* rights, and that Evans waived those rights knowingly, intelligently and voluntarily. Moreover, we agree with the Superior Court that Evans' inquiry of Lieutenant Jamison mid-interview as to whether the interrogation was being videotaped was not, as Evans argues, an invocation of his *Miranda* rights.

(18) Evans claims that Witherspoon's positive identification of him in the second photo array should be suppressed because Evans' photo was identified by name, and Witherspoon had heard on the street that Evans was responsible for the shooting. Evans' claim is not supported by the record. It appears that the Superior Court reviewed the photo arrays that were shown to Witherspoon and determined that none of the photos were identified by name. Moreover, there is nothing in the record to support Evans' allegation that police coerced Witherspoon to change his initial identification, and Witherspoon's change does not support an inference that the identification procedures were impermissibly suggestive.[18]

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is AFFIRMED.

BY THE COURT:

/s/Henry duPont Ridgely
Justice

[18] *Hubbard v. State*, 2001 WL 1089664 (Del. Supr.).